

This Opinion is Not a
Precedent of the TTAB

Mailed: August 25, 2021

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re Juice Generation, Inc.

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Serial No. 88536980

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Nigamnarayan Acharya of Lewis Brisbois Bisgaard & Smith LLP,
for Juice Generation, Inc.

J. Ian Dible, Trademark Examining Attorney, Law Office 111,
Chris Doninger, Managing Attorney.

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Before Kuhlke, Lykos and Dunn,
Administrative Trademark Judges.

Opinion by Lykos, Administrative Trademark Judge:

Juice Generation, Inc. (“Applicant”) seeks registration on the Principal Register of the mark HI-FIBE in standard characters for “Non-alcoholic beverages containing fruits and vegetables juices; smoothies; vegetable-fruit juices and smoothies” in International Class 32.¹

¹ Application Serial No. 88536980, filed July 25, 2019, under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), alleging July 25, 2019, as the date of first use anywhere and in commerce.

Citations to the prosecution file refer to the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system and identify documents by title and date. References to the briefs

Registration was refused under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's applied-for mark so resembles the registered mark HI FIBE in typed format² for "Food additives for non-nutritional purposes high in fiber for use as a flavoring, ingredient or filler for use in bread, tortillas, frozen food entrees, muffins, bagels, cheese, juice drinks, soups, cookies and nutritional bars" in International Class 30 that, when used on or in connection with Applicant's identified goods, it is likely to cause confusion or mistake or to deceive.³

Applicant's appeal of the final refusal is now briefed. For the reasons explained below, we reverse.

I. Evidentiary Objection

Before addressing the substance of this appeal, we will consider first the Examining Attorney's objection to Applicant's reference in its appeal brief to a definition of "nutritional."⁴ The objection is sustained. In addition to being untimely, *see* Trademark Rule 2.142(d),⁵ there is no attribution of source. As such, we have given this evidence no consideration.

and other materials in the appeal record refer to the Board's TTABVUE online docketing system.

² Prior to November 2, 2003, "standard character" drawings were known as "typed" drawings; the preferred nomenclature was changed to conform to the Madrid Protocol. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1909 n.2 (Fed. Cir. 2012); *see also* TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 807.03(i) (July 2021) ("A typed drawing is the legal equivalent of a standard character drawing.").

³ Registration No. 2962380, registered June 14, 2005 on the Principal Register; renewed.

⁴ Applicant's Appeal Brief, p. 3, footnote 1; 4 TTABVUE 4.

⁵ According to 37 C.F.R. § 2.142(d), "[t]he record in the application should be complete prior to the filing of an appeal. Evidence should not be filed with the Board after the filing of a notice of appeal. If the appellant or the examining attorney desires to introduce additional evidence after an appeal is filed, the appellant or the examining attorney should submit a

II. Likelihood of Confusion

We now turn to the refusal before us. We base our determination under Section 2(d) on an analysis of all of the probative evidence of record bearing on a likelihood of confusion. *In re E. I. DuPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). *See also, In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). In any likelihood of confusion analysis, however, two key considerations are the similarities between the marks and the similarities between the goods. *See Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

First we consider the marks. To state the obvious, the marks HI-FIBE and HI FIBE are identical in sound, and but for the inclusion of a hyphen in Applicant’s mark, identical in appearance. *See, e.g., Stock Pot, Inc., v. Stockpot Rest., Inc.*, 220 USPQ 52, 52 (TTAB 1983), *aff’d*, 737 F.2d 1576, 222 USPQ 665 (Fed. Cir. 1984) (“There is no question that the marks of the parties [STOCKPOT and STOCK POT] are confusingly similar. The word marks are phonetically identical and visually almost identical.”); *Mag Instrument Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1712 (TTAB 2010) (“the initial term in both marks [MAG-NUM STAR and MAGNUM MAXFIRE] is essentially identical; the hyphen in the Mag Instrument's mark does

request to the Board to suspend the appeal and to remand the application for further examination.”

not distinguish them.”). Whether the connotation of each mark is a shortened form of “high fiber” as Applicant contends, or a play on the phrase “high five” as the Examining Attorney asserts, individual consumers encountering the marks will interpret them in the same manner. Thus, the first *DuPont* factor weighs in favor of finding a likelihood of confusion.

In addition, Applicant’s attempt to show that the cited mark is weak based on a single cookbook entry for a bean burger recipe called “Hi Fibe” is to no avail.⁶ To find that a cited mark is conceptually or commercially weak, there must be sufficient evidence in the record.⁷ *See, e.g., Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015); *Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1675-76 (Fed. Cir. 2015). The record in this case fails to show that the cited mark is entitled to only a narrow scope of protection.

That being said, a single *DuPont* factor may be dispositive, and when we compare the goods, we find that to be the case here. *See Kellogg Co. v. Pack’em Enterprises Inc.*, 951 F.2d 330, 21 USPQ2d 1142 (Fed. Cir. 1991). The second *DuPont* likelihood of confusion factor involves an analysis of the goods as they are identified in the involved application and cited registration. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018); *Stone Lion Capital Partners, LP v.*

⁶ April 24, 2020 Office Action, p. 5 (entry from *The Great Cholesterol Myth Cookbook* by Johnny Bowden, Stephen Sinatra, and Deirdre Rawlings).

⁷ By contrast, in *Juice Generation*, there were at least twenty-six relevant third-party uses or registrations of record, *see* 115 USPQ2d at 1672 n.1, and in *Jack Wolfskin*, there were at least fourteen, 116 USPQ2d at 1136 n.2.

Lion Capital LLP, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 98 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990); *Hewlett-Packard Co. v. Packard Press Inc.*, 281 F.3d 1261, 62 USPQ2d 1001 (Fed. Cir. 2002). To reiterate, Applicant’s goods are “Non-alcoholic beverages containing fruits and vegetables juices; smoothies; vegetable-fruit juices and smoothies.” Registrant’s identification of goods reads as follows:

Food additives for non-nutritional purposes high in fiber for use as a flavoring, ingredient or filler for use in bread, tortillas, frozen food entrees, muffins, bagels, cheese, juice drinks, soups, cookies and nutritional bars

The crux of this appeal lies with the interpretation of the terms “food additives” and “non-nutritional” in the cited identification of goods. Applicant argues that as per the language above, Registrant’s high fiber “food additives” are limited to “non-nutritional purposes.” In addition, Applicant points to the lack of third-party registrations for both for fiber additives and for smoothies and juices under the same mark. As Applicant contends “food additives” are substances added to foods during processing, storage or packaging and are not used at a point of sale at a restaurant or juice bar selling juices or smoothies. As evidentiary support, Applicant relies on the following excerpt from the HHS.gov website defining “food additive”:

What is a food additive?

In its broadest sense, a food additive is any substance added to food. Legally, the term refers to “any substance the intended use of which results or may reasonably be expected to result (directly or indirectly) in its becoming a component or otherwise affecting the characteristics of any food.” This definition includes any substance used in the production, processing, treatment, packaging, transportation or storage of food.

If a substance is added to a food for a specific purpose in that food, it is referred to as a direct additive. For example, the low-calorie sweetener aspartame, which is used in beverages, puddings, yogurt, chewing gum and other foods, is considered a direct additive. Many direct additives are identified on the ingredient label of foods.

Indirect food additives are those that become part of the food in trace amounts due to its packaging, storage or other handling. For instance, minute amounts of packaging substances may find their way into foods during storage. Food packaging manufacturers must prove to the HHS Food and Drug Administration (FDA) that all materials coming in contact with food are safe, before they are permitted for use in such a manner.

The Examining Attorney counters that “[R]egistrant’s food additive ingredients are not limited to non-nutritional fiber; rather, the fiber-containing food additives are used for non-nutritional purposes, such as for adding flavor or for acting as filler.”⁸ The Examining Attorney also relies on the definition of “food additive” from the U.S. Department of Health and Human Services website (www.hhs.gov) as “any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristic of any food” as well as an entry from WIKIPEDIA as “substances added to food to preserve flavor or enhance its taste, appearance, or other qualities.”⁹ In the Examining Attorney’s view, the record establishes that Applicant’s and Registrant’s goods are complementary products used together. As support, the Examining Attorney points to articles from the websites One Green Planet and Popsinger as well as third-party

⁸ Examining Attorney’s Brief, 6 TTABVUE 10.

⁹ May 12, 2020 Final Office action, pp. 2–4.

providers of customized smoothies and vegetable drinks such as Juceria, Planet Smoothie, Smoothie King, The Smoothie Shop and Supplements, and Tropical Smoothie Cafe showing that flaxseeds and other items are high fiber food additives commonly used as an optional ingredient in smoothies and juices.¹⁰ Nonetheless, the Examining Attorney acknowledges that

[i]t is not apparent in all of these cases whether the flax food additives are used for non-nutritional purposes as identified in the registration; however, this ambiguity does not distinguish the flax food additives in the evidence from the food additives identified in the registration, as the flax food additives are offered as options for customers to choose for any purpose, including whether the customer's preference for flax is motivated by non-nutritional purposes of flavor or filler as identified in the registration.¹¹

Even if we accept the Examining Attorney's broader interpretation of "food additive," we find critical the insufficiency of evidence in the record purporting to show complementary use of the involved goods. "[C]omplementary use has long been recognized as a relevant consideration in determining a likelihood of confusion." *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (holding bread and cheese to be related because they are often used in combination); *see also In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (finding pepper sauce and agave related where evidence showed both were used for the same purpose in the same recipes and thus consumers were likely to purchase the products at the same time and in the same stores). *See also Recot Inc. v. M.C. Becton*, 214 F.3d

¹⁰ May 12, 2020 Final Office action, pp. 5-27.

¹¹ Examining Attorney's Brief, 6 TTABVUE 10.

1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis.”). Based on the record before us, we cannot make the factual finding that Registrant’s identified goods are complementary products to Applicant’s “Non-alcoholic beverages containing fruits and vegetables juices; smoothies; vegetable-fruit juices and smoothies.” This is because we disagree with the Examining Attorney’s supposition that customers adding flax as an “additive” may be doing so for “non-nutritional” purposes. Instead of looking to the motivation of the individual consumers, we think it is more appropriate to look at what the record shows about the actual goods themselves. None of the third-party websites proffered by the Examining Attorney definitively shows flax seed as a customized ingredient as “Food additives for non-nutritional purposes high in fiber for use as a flavoring, ingredient or filler for use ... juice drinks, ...” Rather, each third-party provider on their respective website touts the enhanced nutritional benefits of adding flax to customized smoothies as opposed to any uses as a “flavoring, ingredient or filler.” By way of illustration:

One Green Planet promotes flax as one of several “healthy, fiber-rich foods to add to your smoothie to stay fuller longer,” noting that it also contains “dietary lignans that can help fight heart disease” and whisking away harmful estrogens.¹²

¹² May 12, 2020 Office Action, pp. 5-7 (excerpt from www.onegreenplanet.org).

Planet Smoothie offers flax seed as a “supplemental Blast” to its smoothies as a “heart healthy” option to “naturally cleanse the body and maintain proper blood sugar levels.”¹³

Smoothie King offers “Wellness Enhancers” such as “Fiber Blend” to “support a healthy, balanced diet and fuel your overall health.”¹⁴

Any of the *DuPont* factors may play a dominant role. *In re E. I. DuPont de Nemours & Co.*, 177 USPQ at 567. In fact, in some cases, a single factor may be dispositive. *See Kellogg Co. v. Pack'em*, 21 USPQ2d at 1145 (“we know of no reason why, in a particular case, a single *du Pont* factor may not be dispositive”). In the present *ex parte* appeal, the lack of evidence showing a relationship between the goods outweighs the near identical nature of the marks.¹⁵ For that reason, we find the second *DuPont* factor to be pivotal, and the Examining Attorney’s Section 2(d) refusal is reversed.

Decision: The Section 2(d) refusal to register Applicant’s mark is reversed.

¹³ May 12, 2020 Office Action, pp. 13-14 (excerpt from www.planetssmoothie.com).

¹⁴ May 12, 2020 Office Action, p. 20 (excerpt from www.smoothieking.com).

¹⁵ Notwithstanding our reversal, Applicant’s likening this appeal to *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059 (Fed. Cir. 2003) is misplaced. The U.S. Court of Appeals for the Federal Circuit clarified in *In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082 (Fed. Cir. 2014) that that the heightened “something more” standard first enunciated in *Coors Brewing* may be required in any context where “the relatedness of the goods and services is not evident, well-known or generally recognized.” *See also In re Country Oven, Inc.*, 2019 USPQ2d 443903, 2019 BL 443903 (TTAB 2019). This principle is inapplicable here because we are comparing goods versus goods, not services versus goods.